

ORIGINAL

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

In re Applications of

SCRIPPS HOWARD
BROADCASTING COMPANY

For Renewal of License of
WMAR-TV, Baltimore, Maryland

and

FOUR JACKS BROADCASTING, INC.

For Construction Permit for a
New Television Facility on
on Channel 2 at
Baltimore, Maryland

To: The Honorable Richard L. Sippel
Administrative Law Judge

) MM Docket No. 93-94

) File No. BRCT-910603KX

RECEIVED

FEB 28 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

) File No. BRCT-910603KE

OPPOSITION TO MOTION FOR SUMMARY DECISION

FOUR JACKS BROADCASTING, INC.

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Dated: February 28, 1994

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SUMMARY

For summary decision to be granted on the character issues against it, Scripps Howard must show that no genuine question of fact remains for resolution at a hearing. Scripps Howard's Motion for Summary Decision utterly fails to meet this standard. It leaves numerous substantial and material questions of fact unresolved.

Since Scripps Howard has failed to meet the stringent standard for summary decision, its Motion must be denied. Where, as here, a hearing is required, the Presiding Judge is legally required to make full and complete findings of fact on the issues to be tried. This includes findings concerning the actions of, among others, Emily Barr, a management-level employee of Scripps Howard, Janet Covington, a former Scripps Howard employee, and Scripps Howard's lawyers, who have played pivotal roles and have unique knowledge bearing on the issues against Scripps Howard. Granting Scripps Howard summary decision in order to protect its lawyers would illegally deny Four Jacks the right to a hearing involving all those persons, about whom numerous questions of fact remain unresolved.

Scripps Howard's contention that the NBC correspondence and the Covington notes are not within the scope of Four Jacks' document production request is a red herring. First, Scripps Howard's claim is irrelevant -- what is at issue here is the veracity of Scripps Howard's representations to the Commission, not the technical discoverability of documents. Second, the

claim is wrong -- it cannot be squared with the plain language of Four Jacks' document production request. Third, and perhaps most tellingly, Scripps Howard's argument is inconsistent with Scripps Howard's own actions during the course of this proceeding.

Once Scripps Howard's smokescreen arguments are dispelled and its factual submissions considered, it is clear that too many substantial and material questions of fact remain unresolved to warrant granting summary decision. Among the unanswered questions are:

- When Scripps Howard knew that it possessed correspondence between Emily Barr and NBC;
- What Ms. Covington knows about the writings she herself created. Scripps Howard has supplied no testimony at all from Ms. Covington;
- The full circumstances surrounding the eleventh hour production of the NBC correspondence and Scripps Howard's miraculous recent "discovery" of the 1992 Janet Covington notes -- including the roles of Scripps Howard's counsel in apparently suppressing these documents and, in filings with the Commission, misleading the parties about their nature and existence.
- Whether the 1992 Covington notes were in fact sent by Ms. Barr to Scripps Howard's counsel, at counsel's request, just three days before Scripps Howard's initial document production and less than three weeks before Scripps Howard filed a letter misleading the parties as to the nature and existence of those notes.

Given the lack of answers to these and many other questions, summary decision cannot possibly be granted in Scripps Howard's favor.

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WASHINGTON, D.C.

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Baltimore, Maryland)	
To: The Honorable Richard L. Sippel		
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OPPOSITION TO MOTION FOR SUMMARY DECISION

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys and pursuant to the Presiding Judge's Order, FCC 94M-81 (released February 18, 1994), hereby opposes the Motion for Summary Decision ("Motion") filed by Scripps Howard Broadcasting Company ("Scripps Howard") on February 10, 1994. As set forth below, the Motion comes nowhere close to meeting the standards for grant of summary decision. It must therefore be denied.

Introduction

1. Scripps Howard seeks summary decision in its favor on the misrepresentation/lack of candor issues added against it in

the Judge's Memorandum Opinion and Order, FCC 94M-50 (released February 1, 1994) ("MO&O"). Those issues are:

- A. To determine whether Scripps Howard Broadcasting Company misrepresented or was lacking in candor in connection with deposition testimony and/or pleadings and/or delayed production in discovery relating to NBC documents used in connection with preparing a hearing exhibit that was relevant to the renewal expectancy.
- B. To determine whether Scripps Howard Broadcasting Company misrepresented or was lacking in candor in connection with deposition testimony and/or pleadings and/or correspondence served on the Commission relating to the status of Janet Covington's diary of 1991 and/or Janet Covington's notes of 1992 which were used in connection with preparing a hearing exhibit that was relevant to the renewal expectancy.
- C. To determine the effect of the foregoing issues on the qualifications of Scripps Howard Broadcasting Company to hold a Commission license for Channel 2 in Baltimore.

2. Under Section 1.251 of the Commission's Rules, a party moving for summary decision "may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing." 47 C.F.R. § 1.251(a)(1) (emphasis added). This standard was amplified by the Commission in Midwest St. Louis, Inc., 79 F.C.C.2d 519 (1980):

Because the grant of a summary decision serves to deny an applicant an opportunity for hearing, the standards for a grant of a summary decision must be stringent in order to insure due process. As set out in Section 1.251 of the Commission's Rules, a grant must be predicated on a showing "that there is no

genuine issue of material fact for determination at the hearing." It is, therefore, incumbent on the moving party to establish that it is entitled to a summary decision as a matter of law. [Summary Decision Procedures, 34 F.C.C.2d 485, 486 (1972)]. In determining whether there is a genuine issue as to any material fact, the burden is on the moving party to establish that ". . . there is not the slightest doubt as to the facts and that only the legal conclusion remains to be resolved." Telecorpus, Inc., FCC 74M-848, 30 RR 2d 1641, 1644 n.3 (A.L.J. 1974). A Judge is required to scrutinize carefully the papers filed by the moving party and to treat the pleadings of the opposing party with "considerable indulgence." Summary Decision Procedures, supra, 34 FCC 2d at 488; and Big Country Radio, Inc., 50 FCC 2d 967 (Rev. Bd. 1975).

79 F.C.C.2d at 529.

3. Given this strict standard for summary decision, one would have expected Scripps Howard's Motion to be accompanied by a host of affidavits explaining, for example, as to Ms. Barr's 1992 correspondence with NBC: (i) why Ms. Barr testified at her deposition, first, that she did not make any request to NBC in writing, and, moments later, that she did make such a written request but did not retain the correspondence, and then, magically produced the correspondence three months later; (ii) why, in a pleading filed with the Commission on October 26, 1993, Scripps Howard denied having the NBC correspondence in WMAR-TV's files and, indeed, denied that the documents existed -- only to physically produce the documents to Four Jacks 24 hours later. As to the 1992 Janet Covington notes -- which, mirabile dictu, have just surfaced -- Scripps Howard would have been expected to explain, for example, (i) the origin of these notes through the testimony of Ms. Covington herself; (ii) why Scripps Howard's

counsel, in a letter dated July 13, 1993, failed to identify Covington's notes as having been prepared in 1992 and as a document used in the preparation of Scripps Howard's ascertainment exhibit; (iii) why Scripps Howard attempted initially to pass off these notes as material that Ms. Covington had taken with her and which were not retained in any files at WMAR-TV, only to have Ms. Barr testify that she possessed the notes for some time after the summer of 1992, later throwing them away; and (iv) why, in the face of Ms. Barr's clear testimony that she threw them away, the Covington notes have suddenly been located.

4. Pursuant to the Judge's instructions, Scripps Howard has subsequently supplemented its Motion with materials from just two of the numerous witnesses that can be expected to have first-hand knowledge of the facts with respect to Scripps Howard's conduct concerning the NBC and Covington documents.^{1/} As will be shown below, this supplementary material leaves many substantial and material questions of fact unresolved. What is even more telling, however, is that this factual material is clearly secondary in Scripps Howard's pursuit of summary decision. Scripps Howard's major claim is not based on fact, but is instead premised on the absurd notion that Scripps Howard was

^{1/} Scripps Howard's provision of these supplementary materials itself is hardly a model of forthrightness. None of these materials were contained in Scripps Howard's Motion as originally filed. Instead, Scripps Howard dropped two footnotes in its Motion promising to produce the evidence at some point in the future (Motion at 11-12 n.4, 16 n.6), actually providing that documentation only upon being ordered to do so by the Judge at the February 15, 1994 prehearing conference.

under no duty to produce the NBC correspondence or the Covington notes in the first place. In other words, Scripps Howard's motion primarily rests not on the notion that no factual question exists as to Scripps Howard's truthfulness and candor in this proceeding, but on the argument that its character failings are immaterial as a matter of law because the documents around which these failings revolve were not within the scope of Four Jacks' document production request.

5. As shown below, all of Scripps Howard's contentions are without merit. Initially, the fact that Scripps Howard's attorneys are material witnesses on the issues against Scripps Howard is no reason to resolve those issues by summary decision, as the Presiding Judge appears inclined to do. Moreover, Scripps Howard's argument that the NBC correspondence and Janet Covington's notes were outside the scope of Four Jacks' document production request is (i) irrelevant; (ii) incorrect; and (iii) belied by Scripps Howard's own conduct in this case. Finally, the sparse factual material that Scripps Howard has submitted leaves a multiplicity of substantial and material questions unanswered. In sum, the facts and the law require a full hearing on the issues against Scripps Howard.

Discussion

I. The Fact That a Hearing Under the Issues Against Scripps Howard May Require the Testimony of Scripps Howard's Attorneys Is Not a Reason for Granting Summary Decision

6. Four Jacks observes that the Presiding Judge appears inclined to resolve the issues against Scripps Howard via summary

decision -- despite the fact that, as shown below, Scripps Howard has utterly failed to establish that no substantial and material question of fact remains unresolved. The Judge appears so inclined because of his concern that a hearing would constitute an intrusion upon Scripps Howard's attorneys. Initially, therefore, Four Jacks believes it necessary to dispel the notion that the potential need for the testimony of Scripps Howard's lawyers authorizes the Judge to resolve these issues by way of summary decision.

7. First, while it is true that a full factual hearing on the issues against Scripps Howard will necessitate the testimony of Scripps Howard's attorneys, those attorneys are not the only material witnesses under the issues. As shown below, a hearing on those issues will require, among others, the testimony of Emily Barr -- whose prior testimony provided much of the basis for the addition of the issues -- as well as Ms. Janet Covington, whose writings form the centerpiece for one of the issues. While summary decision would obviously protect Scripps Howard's attorneys, it would also deny Four Jacks the opportunity to cross-examine other, non-attorney witnesses whose testimony is equally necessary to resolving the numerous questions of fact that remain.

8. Moreover, the fact that Scripps Howard's attorneys are material witnesses under the added issues does not, as a legal matter, provide a basis for granting summary decision. In Opal Chadwell, 2 FCC Rcd 1197 (Rev. Bd. 1987), the Review Board recognized that "an attorney's conduct during a hearing may at

times have a direct bearing on substantive matters, which conduct compels the necessary and complete findings of fact." Id. at 1198 (emphasis added).

9. As demonstrated below, the conduct of Scripps Howard's attorneys in this proceeding has a "direct bearing" on the character issues pending against Scripps Howard. Scripps Howard's attorneys drafted and signed a July 13, 1993 letter on behalf of Scripps Howard containing misleading statements as to the nature and existence of critically relevant documents in this case. Scripps Howard's attorneys also drafted and signed an October 26, 1993 pleading -- filed twenty-four hours before the documents were produced -- falsely stating that the NBC correspondence was not in the files of WMAR-TV, that the correspondence may or may not exist, and that a search for the correspondence would create delay. Moreover, Scripps Howard's attorneys have peculiar knowledge of the circumstances leading to the recent production of the 1992 Covington notes and the eleventh-hour production of the NBC correspondence. Under Chadwell, therefore, the Presiding Judge has an obligation to make "necessary and complete findings of fact" which necessarily encompass the role of Scripps Howard's attorneys in Scripps Howard's misrepresentations and concealments. By granting summary decision, the Judge by definition would breach that duty. In short, the potential need for testimony by Scripps Howard's attorneys is no reason for granting Scripps Howard summary decision on the issues against it.

II. **Scripps Howard's Obligation Under the Document Request to Produce the NBC Correspondence and the Covington Notes is Immaterial to the Issues**

10. Scripps Howard's primary position in support of summary decision is related at page 3 of its Motion:

. . . [O]nce it is recognized that Scripps Howard in fact had no obligation to identify or produce these 1992 documents [the NBC correspondence and the Covington notes] to Four Jacks because Four Jacks never asked for them, any issues concerning lack of clarity about their disclosure or any delay in producing them necessarily are rendered immaterial.

11. Thus, in essence Scripps Howard argues that it does not matter whether Scripps Howard lied or concealed facts about the NBC correspondence and the Covington notes, because those documents were not within the scope of Four Jacks' original document request. As Four Jacks shows below, Scripps Howard is wrong in asserting that those documents were not within the scope of the document request.^{2/} But even more fundamentally,

2/ Relatedly, Scripps Howard advances the entirely meritless argument that the Judge's MO&Q adding the issues against Scripps Howard was premised in toto on Scripps Howard's obligation to produce the NBC correspondence and the Covington notes under Four Jacks' document request. See Motion at 2-3, 6-8. True, Scripps Howard's failure to be forthcoming in producing the documents formed part of the basis for the added issues. But the MO&Q was just as much premised on false and misleading statements made by Scripps Howard in written submissions and oral testimony before the Commission, irrespective of whether Scripps Howard had a duty to produce the documents. See, e.g., MO&Q at 3 ¶ 8 (Four Jacks has raised a substantial question of candor in light of statements in Scripps Howard's pleading of October 26, 1993); id. at 5 ¶ 11 ("substantial question of candor raised with respect to the representation made in the letter of July 13, 1993 . . . that Ms. Covington had been contacted to learn whether she possessed the notes"); id. (referencing the "apparent deliberate effort in the July 13 letter to

(continued...)

assuming for the sake of argument that Scripps Howard is right on all counts about its obligation to produce the NBC correspondence and the Covington notes (which it most assuredly is not), its contentions are absolutely irrelevant.

12. It is well-settled that even an immaterial misrepresentation or lack of candor can be disqualifying. "The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." FCC v. WOKO, 329 U.S. 223, 227 (1946); see also Standard Broadcasting, Inc., 7 FCC Rcd 8571, 8574 (Rev. Bd. 1992) ("[w]here inaccurate information results from an intent to deceive . . . , the remedy may be total disqualification, even if the fact concealed does not appear to be particularly significant").

13. Decisions by both the courts and the Commission destroy Scripps Howard's suggestion that Scripps Howard's obligation to produce the NBC correspondence and the Covington notes affects the misrepresentation/lack of candor issues against Scripps Howard. Indeed, the D.C. Circuit has only recently rejected another Scripps Howard-type "the concealed documents weren't

2/(...continued)

obscure or conceal the use of the discarded notes by referring to 'notes' but meaning notations made on Covington's 1991 calendar to the exclusion of her 1992 notes"); id. at 6 ¶ 12 (Ms. Barr's deposition testimony not forthcoming with respect to the existence of the NBC documents); id. at 6 ¶ 13 ("Scripps Howard was not forthcoming in deposition testimony or in its transmittal letter of July 13, 1993, with respect to the facts and circumstances regarding the Covington diary of 1991 and the Covington notes of 1992").

material" argument under facts remarkably similar to those involved here. In Garden State Broadcasting Limited Partnership v. FCC, 996 F.2d 386 (D.C. Cir. 1993), the court affirmed the Commission's disqualification of a challenging renewal applicant for lack of candor in failing to produce, until after the Commission remanded the case to adduce evidence on a specific issue, documents of its counsel which were directly relevant to the bona fides of the challenging applicant. In so doing, the court rejected the applicant's arguments that its opponent's document request did not extend to the documents in question, and that the applicant did not produce the information earlier "because it was not aware that the FCC attached any significance to it." Id. at 393. See also Lincoln Television, Inc., 38 R.R.2d 1063, 1067-69 (ALJ 1976) (summary decision on reporting issue denied where applicant claimed that unreported judgments not required to be reported).

14. The issues added against Scripps Howard do not seek to determine whether Scripps Howard had a duty to produce the NBC correspondence and the Covington notes. Instead, they seek to determine the veracity of numerous statements made by Scripps Howard to the Commission. Thus, it is simply irrelevant whether the documents at issue had been asked for by Four Jacks. What is relevant is "judging the reliability of an applicant's submissions [and] assessing [its] candor and forthrightness." WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1140 (D.C. Cir. 1985).

**III. The NBC Correspondence and the Covington Notes
Fall Squarely Within Four Jacks' Production Request,
and Scripps Howard Has Confirmed That Fact by Its
Conduct in the Hearing**

15. In any event, Scripps Howard's claim that it was under no duty to produce the NBC correspondence and the Covington notes is untenable. First, Scripps Howard's contention cannot withstand a reading of Four Jacks' document production request. Scripps Howard's argument proceeds from the fact that Part III(b) of Four Jacks' request for production of documents was prefaced by the introductory phrase "All Documents relating to the preparation of the above Issues/Programs Lists," which were defined in Part III(a) as "All Issues/Programs Lists covering the relevant period [May 30-September 3, 1991]." Thus, Scripps Howard maintains that the specific phrases "Documents describing the conduct and results of ascertainment efforts" and "Documents reflecting the compilation of responsive programming lists" in Part III(b) were limited to documents in those categories "relating to the preparation" of the May 30-September 3, 1991 issues/programs lists. According to Scripps Howard, since the NBC correspondence and Covington notes were not created until 1992, they cannot relate to the "preparation" of the May 30-September 3, 1991 WMAR-TV issues/programs lists, and therefore are not within the scope of the document request. Motion at 4-6.^{3/}

^{3/} In grandiose fashion, Scripps Howard accuses Four Jacks' Consolidated Reply to Oppositions to Petition to Reopen the Record and Enlarge the Issues ("Reply") of "baldly misrepresenting" Four Jacks' document production motion.

(continued...)

16. There are, however, several fundamental problems with this analysis. First, while some of Four Jacks' document requests were expressly limited to the May 30-September 3, 1991 Renewal Period, the document request at issue is in no way so limited. Moreover, as Scripps Howard itself grudgingly recognizes (Motion at 6 n.1), the Judge required Scripps Howard to produce not only documents relating to the preparation of the issues/programs lists, but "copies of all documents relating [at all] to the above Issues/Programs lists." Order, FCC 93M-400, released June 24, 1993. The NBC correspondence and the Covington notes unquestionably "related" to the WMAR-TV issues/programs lists for May 30-September 3, 1991, and this is so whether or not the documents were created in 1991 or 1992.^{4/}

17. Moreover, even if Scripps Howard is correct that the Judge's document production order "did not purport to expand the documents subject to discovery beyond those requested by Four

3/ (...continued)

See Motion at 4, 10, 17-18. However, it is difficult to see how this can be the case, given that Four Jacks' Reply quoted, not merely paraphrased, the relevant portions of the document production request. Moreover, it is impossible to fathom (and Scripps Howard does not explain) how Four Jacks would have any conceivable motive to misrepresent the terms of a document that is a part of the record in this proceeding.

4/ Four Jacks notes in passing that part of the Barr/NBC correspondence was a sample database synopsis printout that NBC sent to Barr, apparently to see if that was the type of information that Ms. Barr needed. While that document and the mountain of other synopses provided to Ms. Barr may have been printed out in 1992, it is virtually certain that this information was entered into the NBC database contemporaneously with the 1991 airing of the NBC programs described therein. Thus, at least with respect to the synopses themselves, it is inaccurate to state that these were 1992 documents.

Jacks" (Motion at 6 n.1) -- a premise that is unsupported -- Scripps Howard cannot overcome the fact that Four Jacks' document request contained explicit, specific requests for "Documents describing the conduct and results of ascertainment efforts" and "Documents reflecting the compilation of responsive programming lists." In this regard, the prefatory phrase "All Documents relating to the preparation of the above Issues/Programs lists" was in no way intended to limit these two discrete categories of documents. It simply cannot be denied that the Covington notes and NBC correspondence fell directly within explicit language in Four Jacks' document production request.

18. Even more tellingly, Scripps Howard's own conduct in document production contradicts what Scripps Howard claims has been its consistent position with respect to these documents. In its original June 1993 document production, Scripps Howard produced (i) all of the NBC synopsis printouts that Ms. Barr had received as a result of her 1992 correspondence with the network; and (ii) the personal calendars of Ms. Barr, Arnold J. Kleiner, and Maria Velleggia. It did so without even the slightest hint that any of these documents might not be within the scope of Four Jacks' document production request.

19. The 1992 Covington notes, along with the personal calendars of Ms. Barr, Mr. Kleiner, and Ms. Velleggia, constituted the whole of the documentary source material that Ms. Barr used in creating what is now Attachment E to Scripps Howard Ex. 3. Tr. 577-78, 663. Appended hereto as Exhibit A is a copy of the cover letter from counsel which accompanied Scripps

Howard's original June 28, 1993 document production to Four Jacks. Following that letter is a portion of Scripps Howard's document production labeled "Documents Produced in Response to Part III(b) of Motion for Production of Documents by Scripps Howard Broadcasting Company." Part III(b) is the provision that Scripps Howard now contends did not encompass the NBC correspondence or the 1992 Covington notes. As can be seen in Exhibit A hereto, among the documents that Scripps Howard produced as "responsive to Part III(b)" were the personal calendars of Ms. Velleggia, Ms. Barr, and Mr. Kleiner. See Exhibit A, pp. SH-000037 through SH-000168.

20. Moreover, appended hereto as Exhibit B is a cover letter from Scripps Howard's counsel that accompanied an additional document production made by Scripps Howard to Four Jacks on July 13, 1993. The cover letter from Scripps Howard's counsel indicates that pages SH0010710 to SH0010728 "respond to request (b)" -- again, the provision that Scripps Howard now claims does not encompass the NBC correspondence or the 1992 Covington notes. Counsel's cover letter further notes that "the attached documents that are responsive to request (b) comprise the pocket diary of Arnold J. Kleiner for the relevant period. During the relevant period, Emily Barr kept a pocket diary that she did not retain."

21. While Scripps Howard now claims that Ms. Covington's notes were not within the scope of request (b) in Four Jacks' motion for production of documents, it is extremely significant that Scripps Howard had no problem determining that the remaining

source materials for Scripps Howard's ascertainment exhibit -- the calendars and pocket diaries of Barr, Kleiner, and Velleggia -- were directly responsive to that request. Scripps Howard may claim that unlike the 1992 Covington notes, the Barr, Kleiner and Velleggia calendars were created in 1991. In the final analysis, however, Scripps Howard's argument why the NBC correspondence and the Covington notes were outside the scope of Four Jacks' document production request is not that they were created in 1992. Rather, it is that those documents did not relate to the "preparation" of the WMAR-TV's May 30-September 3, 1991 issues/programs lists. See Motion at 6 n.1. But if that has been Scripps Howard's position, why did it produce, directly in response to the document request at issue, the Barr, Kleiner and Velleggia calendars -- which, presumably, also were not used in preparing the station's 1991 issues/programs lists? Scripps Howard is so eager to change its readings of Four Jacks' document production request to suit its purposes, it cannot escape tripping over its varying interpretations. Quite simply, now faced with disqualifying issues on its failure to produce the Covington notes and the NBC correspondence, Scripps Howard is concocting a claim as to the scope of Four Jacks' document production request that is inconsistent with Scripps Howard's own actions at the time of document production.

22. Indeed, until now, Scripps Howard has never interposed anything remotely resembling a timely objection to producing the Covington notes and NBC correspondence on the ground that the documents were not within the scope of Four Jacks' request. As

to the NBC correspondence, Scripps Howard never made any such contention at Ms. Barr's deposition, when Ms. Barr first revealed that written correspondence with NBC existed. Even Scripps Howard's October 26, 1993 opposition to Four Jacks' appeal of the denial of a subpoena for that material made no mention of Scripps Howard's allegedly "consistent[]" and vigorous[]" position that the NBC correspondence was outside the scope of Four Jacks' request. Only at the October 27, 1993 prehearing conference -- when Scripps Howard suddenly announced that the documents were in its possession and their production was a fait accompli -- did Scripps Howard for the first time mention its position that the NBC correspondence did not fall under the request. Tr. 410-411.

23. As to the Covington notes, Scripps Howard has never previously contended that they are outside the scope of the request.^{5/} Indeed, as noted above, Scripps Howard produced the remaining source materials for its ascertainment exhibit expressly in response to the request. Moreover, at hearing, when Ms. Barr first disclosed the true nature and date of Ms. Covington's notes, Four Jacks' counsel asked point-blank why the destruction of those notes was not disclosed in response to Four Jacks' motion for production of documents. Scripps Howard there had a perfect opportunity to state its position that the notes

^{5/} Scripps Howard's Motion cites Tr. 601-02 in an attempt to show that Scripps Howard has "consistently and vigorously" maintained that the Covington notes are outside the scope of the request. But at Tr. 601-02, the discussion is not addressing the Covington notes themselves, it is addressing the "next link in the chain" draft of Scripps Howard Ex. 3, Att. E, the existence of which had just been disclosed in cross-examination. See Tr. 602-03.

were not within the scope of the production request. Instead, Scripps Howard's counsel made just the opposite contention:

MR. HOWARD: Your Honor, I think, I think we did disclose the -- that we did not have Ms. Covington's notes in response to the production of documents.

Tr. 594 (emphasis added). Even now, in its instant Motion, Scripps Howard concedes that the "contemporaneous [Covington] writings" referred to in the July 13 letter -- whatever they were -- were "within the scope of [Four Jacks'] request." Motion at 14.

24. Thus, not only is Scripps Howard's claim as to the scope of Four Jacks' document production request wrong on its merits, but Scripps Howard obviously is playing games with the Presiding Judge and the parties. Scripps Howard's actions with respect to the NBC correspondence and the Covington notes follow a disturbingly similar pattern. First, Scripps Howard obfuscates, conceals, and misrepresents the facts to convey the impression that the questioned documents do not exist (with respect to the NBC documents, by Ms. Barr's dissembling deposition testimony and Scripps Howard's candorless October 26, 1993 pleading; with respect to the Covington notes, by counsel's misleading July 13, 1993 letter and Ms. Barr's false testimony that she threw the notes away). Then, when its bluff is called (i.e., the October 27, 1993 prehearing conference on the NBC material; the addition of issues with respect to the Covington notes), Scripps Howard miraculously locates the documents and produces them. Finally, when the obvious questions concerning

Scripps Howard's candor in dealing with the documents arise, Scripps Howard arrogantly defends itself by claiming that Four Jacks was never entitled to the documents in the first place.

25. The courts have made clear that the Commission "'is not expected to play procedural games with those who come before it in order to ascertain the truth.'" Garden State, 996 F.2d at 393 (quoting RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981)). Procedural games, however, are the very essence of Scripps Howard's tactics in this proceeding. Scripps Howard never interposed a timely claim that the NBC correspondence and the Covington notes were outside the scope of Four Jacks' document request.^{6/} Now, with its back to the wall, Scripps Howard advances a groundless legal position which is inconsistent with its own conduct throughout this proceeding -- and even inconsistent with statements in the Motion itself. Scripps

6/ Moreover, despite Scripps Howard's hypertechnical arguments concerning the scope of Four Jacks' document request, Scripps Howard has never once contested the relevance of the NBC correspondence or the Covington notes. The Presiding Judge has also recognized the relevance of these documents. See MO&O at 3 ¶ 8 ("It was ruled to be relevant that Ms. Barr needed to ask NBC for ascertainment evidence"); id. at 7 ¶ 15 (citing "conflicts in the record with respect to evidence which is substantial to the renewal expectancy"). Even now, while staunchly denying that the Covington notes needed to be produced under Four Jacks' request, Scripps Howard continues to concede that Ms. Covington's writings are "relevant to this proceeding." Motion at 14. Scripps Howard hardly could claim otherwise. Its witness Ms. Barr was questioned repeatedly, at deposition and at hearing, about the NBC correspondence and the Covington notes. Thus, like the applicant found to have lacked candor in Garden State, Scripps Howard "knew the[se] issue[s were] of paramount importance yet it did not make any effort to produce the information until the FCC forced it to do so." 996 F.2d at 394.

Howard's late and desperate argument provides no ground for awarding summary decision.

IV. Scripps Howard's Motion and Supplementary Filings Leave Numerous Substantial and Material Questions of Fact Unresolved

26. Neither Scripps Howard's Motion nor the supplementary materials it subsequently filed resolve the numerous substantial and material questions of fact as to whether Scripps Howard lied and concealed facts regarding the NBC correspondence and the Covington documents. As shown below, summary decision clearly cannot be granted on the record presently before the Presiding Judge.

A. The NBC Correspondence

27. Notably, Scripps Howard now admits in its Motion that its October 26, 1993 pleading falsely represented that Scripps Howard did not have the NBC correspondence. Motion at 11. Scripps Howard blithely claims that this misrepresentation was just a "mistake," and goes on to offer naked speculation on the matter:

. . . [I]t strains credibility to suggest that Scripps Howard could have known it had the NBC facsimile document on October 26 and, while knowing that a prehearing conference on the matter was scheduled for October 27, then filed a false pleading the day before the conference (at the Presiding Judge's request) stating that it did not have the document, but then produced the document on October 27. What conceivable bad motive could underlie that conduct?

Id.

28. Of course, it is not Scripps Howard's job to ask questions in a motion for summary decision -- it is Scripps Howard's job to answer them. All that Scripps Howard offers on this score is a "First Supplement to Motion for Summary Decision" ("First Supplement"), filed on February 17, 1994, consisting of a Declaration by Ms. Barr accompanied by copies of two facsimile transmissions from Ms. Barr to Kenneth C. Howard, Jr., one of Scripps Howard's attorneys. The documents being transmitted appear to be the NBC correspondence. Each page of the transmissions contains a line of facsimile information at the top which includes the notations "WMAR-TV Exec Offices," the WMAR-TV fax number, the date October 26, 1993, and times between 5:44 p.m. and 5:57 p.m.^{2/}

29. Even assuming that the NBC correspondence was faxed by Ms. Barr to Mr. Howard on October 26, 1993 between 5:45 and 6:00 p.m., as the facsimile documents would appear to indicate, Scripps Howard's supplement carefully leaves unanswered the critical question: when did Scripps Howard or its attorneys first know that the NBC correspondence in fact existed at WMAR-

^{2/} In a footnote to the First Supplement, Scripps Howard states that the facsimile transmission information was deleted from the NBC correspondence before it was originally produced to Four Jacks. This was done, inter alia, so that the documents "would not reveal privileged information." First Supplement at 2 n.1. This statement raises questions in and of itself. Since when does mere facsimile transmission information -- which does not even indicate to whom the document was sent -- constitute "privileged information"? Given that the transmission information is purported to support Scripps Howard's version of facts, why was that information deleted before production to Four Jacks? Or was there other "privileged information" that has yet to be disclosed?